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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

)	Case No: 3:19-cv-00661-LRH-WGC
GREAT BASIN RESOURCE WATCH; et al.,)	
)	
Plaintiffs,)	PLAINTIFFS' REPLY ON MOTION
)	TO COMPLETE THE RECORD,
)	(and IN THE ALTERNATIVE
)	SUPPLEMENT THE RECORD)
)	
vs.)	
)	
UNITED STATES DEPARTMENT OF THE)	
INTERIOR; et al.,)	
)	
Defendants.)	
)	
EUREKA MOLY, LLC,)	
)	
Defendant-Intervenor.)	
)	

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INTRODUCTION

Plaintiffs Great Basin Resource Watch, Western Shoshone Defense Project, and the Progressive Leadership Alliance of Nevada (collectively “GBRW”) submit this Reply to the Federal Defendants/BLM’s Response brief regarding GBRW’s Motion to complete the Administrative Record (“AR”), or in the alternative, to either supplement the record with, or take judicial notice of, agency documents omitted from the AR.

BLM portrays GBRW’s Motion as one that would “mire the Court in thousands of irrelevant documents,” Fed. Resp. 4, and result in “an ungainly compilation” of additional documents. Fed. Resp. 3. Such hyperbole, however, is not supported by the facts. GBRW has provided a limited number of specific documents – BLM’s own documents – that certainly are not “irrelevant,” as they deal precisely with the issues in this case. They were either submitted by GBRW with its comments, or were considered directly or indirectly by BLM.¹

It is not surprising why BLM wants to block this Court’s consideration of the BLM documents, as they expressly contradict the assumptions contained in the challenged Record of Decision (“ROD”) and Final Supplemental EIS (“FSEIS”) for the Mt. Hope mine. Yet under controlling precedent, an agency cannot selectively refuse to include documents that undermine its position. The APA’s obligation to provide a complete record is “imposed to ensure that agency action does not become effectively unreviewable, for ‘[i]f the record is not complete, then the requirement that the agency decision be supported by ‘the record’ becomes almost meaningless.’” *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).” In re United States, 875 F.3d 1200, 1205 (9th Cir. 2017). An incomplete record – like the one produced in this case – must therefore “be viewed as a fictional account of the actual decisionmaking process.” Portland Audubon Soc., 984 F.2d at 1548 (9th Cir. 1993).

¹ The documents are listed as Exhibits 2-13 attached to GBRW’s Motion. BLM now agrees to supplement the record with Exhibit 6, GBRW’s April 21, 2019 email which provided GBRW’s comment letter and the dedicated computer link to Exhibits 2-5. Fed. Resp. n.3 (p. 6).

1 **I. Plaintiffs' BLM Documents Belong in the Record**

2 1. *Exhibits 2-5 Were Before the Agency As They Were Submitted "As Part Of" GBRW's*
3 *Comments*

4 BLM does not deny that GBRW provided BLM with a dedicated computer link to Exhibits
5 2-5 as part of GBRW's April 21, 2019 comments. Each of these are BLM Environmental
6 Assessments ("EA"s) from other BLM offices which detail BLM's current policy of including
7 reasonable estimates of air pollution emissions that are predicted to occur as a result of BLM-
8 issued oil and gas leases. In contrast, in its review of the Mt. Hope mine, BLM failed to consider
9 any air pollution emissions that may result from the 100+ oil and gas leases in the area.

10 BLM asserts, wrongly, that GBRW merely submitted general citations to internet websites
11 for these documents, and that "consideration by citation" is not enough to include the documents
12 in the record. Fed. Resp. 6. But that is not what happened. GBRW's comment email to BLM
13 (Exhibit 6) attached the specific comment letter and provided a dedicated link to all of the
14 documents (including Exhibits 2-5) that GBRW specifically referenced and discussed in its letter.
15 In that email, GBRW notified BLM that: "**As part of our comments** are a number of supporting
16 documents at the following download..." Exhibit 6 (emphasis added). BLM cannot ignore
17 documents that are "part of our comments."

18 In the comment letter itself, GBRW relied on these Exhibits to show how BLM's decision
19 not to include any air pollution estimate whatsoever from the oil and gas operations that would
20 occur on the leases contradicted its national policy, as shown by the BLM EAs. GBRW stated:

21 Further, recent BLM NEPA analysis for oil and gas leases include an estimate of potential
22 air pollutant emissions from future exploration/development of these leases. *See* attached
23 BLM EAs for leasing in Montana, South Dakota, North Dakota, and New Mexico. ...
24 Also, as noted by BLM in these other EAs, BLM is also capable of analyzing/estimating
25 the indirect and cumulative impacts to water quantity/dewatering, water quality, and other
resources resulting from activities on the leases (as well as actually measuring background
levels of air pollutants in the area).

26 AR063996.

27 For both the comment letter and the dedicated link, all BLM had to do was click on its
28 computer to access all of the documents. BLM clicked on GBRW's attached comment letter and

1 included that in the record, but for some reason BLM purportedly did not click on the link to
2 access the other documents provided by GBRW. Nor did BLM bother to inform GBRW that it
3 refused to access the linked documents. GBRW had no reason to believe that BLM would refuse
4 to access the documents or that they would not be considered “as part of” the comments.

5 In fact, due to the size of the linked documents (totaling over 300 mB), GBRW could not
6 merely attach them to its comment email. BLM acts as if it does not know how to access
7 documents provided via a direct computer link. Yet, as GBRW noted in its Motion (at 11-12), the
8 only way the public could access BLM’s draft documents during the public comment period was
9 through a similar dedicated computer link. The same is true, of course, for proceedings before all
10 federal courts, as all documents are accessed via a computer link in the ECF system. In other
11 words, BLM cannot plausibly claim that it was incapable of accessing the Exhibits.

12 BLM fails to rebut the basic rule that it “may not simply remain studiously ignorant of
13 material scientific evidence well known to the agency and brought directly to its attention in
14 timely-filed comments.” American Wild Horse Preservation Campaign v. Salazar, 859 F. Supp. 2d
15 33, 43 (D.D.C. 2012). Nor does BLM attempt to rebut GBRW’s reliance on a recent analogous
16 decision in Black Warrior River-Keeper v. EPA, No. 2:19-cv-00344-JHE (S.D. Ala. 2019)(Exhibit
17 14), where the court rejected an agency’s similar attempt to exclude documents that were provided
18 via a dedicated computer link.

19 BLM relies heavily on Sequoia Forestkeeper v. U.S. Forest Service, 2010 WL2464857
20 (E.D. Cal. 2010). Fed. Resp. 6. But that case is easily distinguished, as there, the document in
21 question was merely an internet citation and “was an *underlying source document* for information
22 contained in a different, non-cited portion” of yet another document. Id. *6 (emphasis in original).
23 Indeed, documents in the record in that case “*do not rely upon or even refer to information taken*
24 *from* [the document plaintiffs wanted to include].” Id. (emphasis in original).
25

26 That is a far cry from the situation here, where both GRBW’s April 21, 2019 email as well
27 as its comment letter specifically discussed Exhibits 2-5 as evidence of BLM’s contradicting
28 policy across the West which estimates environmental impacts resulting from oil and gas leasing.

1 Nor did GBRW merely provide a general internet cite to these Exhibits, as GBRW provided a
 2 dedicated link directly to BLM. As such, they are properly in the record.

3 2. *Exhibits 7-11 Were At Least “Indirectly Considered” by BLM, as They Were Part of*
 4 *BLM’s NEPA Analysis*

5 BLM also asserts that its NEPA analysis for the nearby Gold Bar and Prospect Mountain
 6 mines (Exhibits 7-11), were not considered when it prepared its air quality analysis for Mt. Hope.
 7 These documents were produced by the very same BLM office that reviewed/approved the Mt.
 8 Hope mine. “The ‘whole’ administrative record ... consists of all documents and materials directly
 9 or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency’s
 10 position.” Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 555 (9th Cir. 1989)(emphasis in
 11 original)(citations omitted).

12 The Ninth Circuit specifically faulted BLM in the original EIS for using “zero” as the
 13 baseline levels for Clean Air Act Criteria Pollutants existing and expected in the Mt. Hope area.
 14 Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1101-1106 (9th Cir. 2016). In the
 15 challenged FSEIS, BLM nevertheless again set the baseline levels at zero, asserting that: “The
 16 emissions for this analysis were taken from the SEIS for the Ruby Hill Mine Expansion – East
 17 Archimedes Project (BLM 2005) and recent NEPA analyses completed for the Gold Bar Project
 18 and Prospect Mountain Mine Project.” FSEIS at 36, AR066385.

19 But the “recent NEPA analyses **completed** for the Gold Bar Project and Prospect
 20 Mountain Mine Project” necessarily includes the **completed** Final EIS for the Gold Bar mine and
 21 the Final EA for the Prospect Mountain mine (along with the completed approval decisions such
 22 as the ROD for Gold Bar and the Decision Record for Prospect Mountain).

23 The reason why BLM tried to exclude these documents from the record is obvious, as the
 24 FEIS and EA for these mines used significantly higher baseline numbers for air pollutants in the
 25 Mt. Hope area. Motion at 14-15. Instead of including the “recent NEPA analysis completed” for
 26 these mines in the record, BLM included in the record only a consultant’s 2017 air quality report,
 27 which used the “zero” baseline level. Notably, that report predated the “completed” NEPA
 28

1 analysis for both of these mines (by two years in the case of the 2019 EA for Prospect Mountain).

2 BLM admits that, despite its statement that it relied on the “completed” NEPA analysis for
3 the two mines, it actually “considered only the emissions data” from the 2017 air report, not the
4 completed analysis. Fed. Resp. 8. But BLM cannot avoid the fact that “NEPA analysis” is not just
5 data, but the actual analysis of the data contained in the EIS/EA for these mines. This Court should
6 reject BLM’s cherry-picking of documents to support its desired conclusion at Mt. Hope.

7 3. BLM “Carefully Considered” EPA’s Comments, Which Specifically Discussed and
8 Referenced Exhibit 12, BLM’s EA for the Nearby Oil and Gas Lease Sale

9 Regarding BLM’s EA analyzing the environmental impacts expected from its latest round
10 of oil and gas leasing around Mt. Hope, BLM admitted that it “carefully considered” EPA’s
11 comments on the FSEIS. BLM ROD at 8, AR066817. Those comments expressly highlighted how
12 BLM’s 2019 Lease Sale EA (Exhibit 12) directly contradicted the Mt. Hope FSEIS’ conclusions
13 regarding the cumulative impacts from the leasing on air quality and water resources (due to the
14 significant water usage required by the expected oil and gas operations). *See* GBRW Motion at 7-8
15 (detailing EPA’s analysis and reliance on the 2019 Lease Sale EA).

16 Despite “carefully considering” EPA’s comments, BLM now asserts that it never saw its
17 own Lease Sale EA which EPA discussed at length. BLM argues that including its Lease Sale EA
18 in the record “stretches the chain of indirect causation to its breaking point.” Fed. Resp. 7. This
19 begs the obvious question of how could BLM “carefully consider” EPA’s comments on the air and
20 water issues related to the Lease Sale EA and the FSEIS for Mt. Hope when it purportedly never
21 looked at the document discussed by EPA – the document produced by the very same BLM office
22 a few months earlier?²

23 BLM argues that its Lease Sale EA should only be included in the record if it was “*heavily*
24 *relied upon* in the agency’s final decision.” Fed. Resp. 7 (emphasis by BLM). But that is not the
25

26 ² The agency is required by NEPA to fully respond to all comments. *See Cntr. For Biol. Div. v.*
27 *U.S. Forest Service*, 349 F.3d 1157, 1167 (9th Cir. 2003); *Seattle Audubon Soc’y v. Espy*, 998
28 F.2d 699, 704 (9th Cir. 1993)(agency required to address the criticisms disputing evidence upon
which the EIS’s management strategy rested); 40 C.F.R. §1502.9(b)(“Final environmental impact
statements shall respond to comments....”).

1 standard for inclusion of documents in the record. The administrative record is “not necessarily
 2 those documents that the **agency** has compiled and submitted as ‘the’ administrative record.”
 3 Thompson, 885 F.2d at 555 (emphasis in original). Rather, “[t]he ‘whole’ administrative record ...
 4 consists of all documents and materials directly or indirectly considered by agency decision-
 5 makers and includes evidence contrary to the agency’s position.” Id.

6 As the court in Sequoia correctly held: “[T]he agency may not exclude information from
 7 the AR simply because it did not ‘rely’ on the excluded information in its final decision.” 2010
 8 WL2464857, at *3, *quoting Maritel, Inc. v. Collins*, 422 F.Supp.2d 188, 196 (D.D.C. 2006). In
 9 one of the cases analyzed in Sequoia, Cntr. for Biol. Div. v. U.S. BLM, 2007 U.S. Dist. LEXIS
 10 (N.D.Cal.2007), “the issue was not whether BLM actually ‘relied’ on the Box data. The court
 11 noted that because the Box data was developed by BLM (and thus, known to it) and it related
 12 directly to the issue in question, it was ‘before’ the agency ‘at least indirectly.’ *Id.* at *14–15.
 13 Thus, the court determined that it should be part of the record. *Id.*” Sequoia, *5.

14 Here, there is no credible argument that the same BLM official that analyzed/approved the
 15 Mt. Hope FSEIS/ROD was unaware of the 2019 Lease Sale EA which he issued a few months
 16 earlier, especially when EPA highlighted that EA in its comments to BLM on Mt. Hope.
 17

18 **II. This Court Should Supplement the Record with Plaintiffs’ Exhibits**

19 Even if the Exhibits are not included in the record itself, this Court has broad authority to
 20 supplement the record “to help the court understand whether the agency complied with the APA’s
 21 requirement that the agency’s decision be neither arbitrary nor capricious.” Bundorf v. Jewell, 142
 22 F.Supp.3d 1138, 1145 (D. Nev. 2015)(internal quotations omitted). The parties agree that this
 23 Court may supplement the record with documents to determine “whether the agency has
 24 considered all relevant factors and has explained its decision,” and/or are “necessary to explain
 25 technical terms or complex subject matter.” Lands Council v. Powell, 395 F.3d 1019, 1030 (9th
 26 Cir. 2005). As Chief Judge Du held, the record may be supplemented “to identify and plug holes
 27 in the administrative record.” Bundorf, at 1145. The record may be supplemented “to determine
 28 whether an agency’s ‘course of inquiry was insufficient or inadequate.’” Ursack, Inc. v. Sierra

1 Interagency Black Bear Group, 2009 WL2422784, *6 (N.D. Cal. 2009)(citations omitted).

2 Contrary to BLM, the agency documents are not “thousands of pages of superfluous
3 technical analysis ... that are unnecessary to explain BLM’s 2019 Mt. Hope Decision.” Fed. Resp.
4 12. They do not “obfuscate[] the existing record,” Id. The BLM documents do not “add to the
5 confusion to the determination of BLM’s analysis for Mt. Hope.” Id.

6 Rather, they are BLM’s own documents that directly contradict the agency’s cursory
7 review of the baseline air quality situation around Mt. Hope, and the expected cumulative impacts
8 from recent oil and gas leasing on air pollution and critical and scarce water supplies in the area.

9 BLM asserts that because the FSEIS discussed air quality issues and “explained its
10 decision,” this Court may not supplement the record with the other BLM documents that
11 contradict those explanations. Fed. Resp. 11. Contrary to BLM, the fact that the challenged FSEIS
12 sets the baseline levels of air pollution (“zero” according to BLM), and assumed that operations
13 conducted on the 100+ oil and gas leases surrounding Mt. Hope will have absolutely no potential
14 cumulative impacts to air and water resources, does not mean that this Court may not “identify and
15 plug holes in the administrative record.” Bundorf, at 1145.

16 Judge Du allowed extra-record evidence “to point out factors that are missing from Federal
17 Defendants’ wildlife analysis.” Id. at 1146. The court “cannot adequately discharge its duty to
18 engage in a ‘substantial inquiry’ if it is required to take the agency’s word that it considered
19 relevant matters.” ASARCO, Inc. v. EPA, 516 F.2d 1153, 1160 (9th Cir. 1980). “[I]t is both
20 unrealistic and unwise to ‘straightjacket’ the reviewing court with the administrative record. It will
21 often be impossible, especially when highly technical matters are involved, for the court to
22 determine whether the agency took into consideration all relevant factors unless it looks outside
23 the record to determine what matters the agency should have considered but did not.” Id.

24 That is the situation here, as GBRW’s Exhibits all deal directly with “factors that are
25 missing from” BLM’s analysis. Bundorf, at 1145. Exhibits 2-5 and 12 are recent BLM EAs that
26 analyze the extent of air pollution emissions that can be expected from a standard oil and gas lease
27 on public land. Each EA predicts significant emissions from each lease. *See* Exhibits 2-5 (EAs
28

1 from other BLM offices), and Exhibit 12 (EA issued by the same Battle Mountain office
 2 highlighted and discussed in EPA's comments). Yet, in the Mt. Hope FSEIS, BLM simply says,
 3 with little discussion, that operations on the 100+ oil and gas leases will have absolutely zero
 4 potential emissions, and indeed no environmental impacts at all. As Bundorf explains, the court
 5 should supplement the record with such evidence when "it is not clear whether Federal Defendants
 6 considered the long-term effects" of the project on affected resources. 142 F.Supp.3d at 1146.

7 The BLM EAs at issue here all detail the agency's analysis and prediction of impacts
 8 resulting from oil and gas leasing. For example, as noted above and in GBRW's Motion, the
 9 Exhibits highlight the contradictions between the Mt. Hope FSEIS's conclusion that there can be
 10 no cumulative impacts to water and air from the oil and gas operations when the BLM EAs all
 11 determine that there **will be** impacts. Extra-record evidence is allowed to show the "unexplained
 12 inconsistencies" between the challenged decision and the facts. Bundorf at 1146.

13 The EPA specifically notified BLM that the 2019 Lease Sale EA (Exhibit 12) exposed the
 14 shortcomings of the Mt. Hope FSEIS. "EPA recommends the ROD [for Mt. Hope] disclose and
 15 discuss the significance of these cumulative aquatic resource effects and what restrictions,
 16 buffers, engineering controls or other mitigations would be most appropriate to protect scarce
 17 water resources." EPA letter at 2, AR066757. Yet BLM never conducted this review, instead
 18 acting as if the scientific findings in the Lease Sale EA did not exist. The agency's failure to
 19 consider mitigation measures (like those noted by EPA) was one of the grounds Judge Du
 20 relied on to order the record supplementation in Bundorf, at 1147.

21 Notably, the extra-record evidence allowed in Bundorf was a newly-created outside expert
 22 declaration submitted by plaintiffs. Here, all of the documents provided by GBRW are BLM's
 23 own documents – and in the case of the 2019 Lease Sale EA (Exhibit 12) and the completed
 24 NEPA analysis for the Gold Bar and Prospect Mountain mines (Exhibits 7 and 9), from the very
 25 same BLM office that reviewed/approved the Mt. Hope mine.³ These Exhibits thus all provide
 26

27 ³ BLM also challenges GBRW's request to include/supplement the record with BLM's approval
 28 documents for the 2019 Lease Sale and the Gold Bar and Prospect Mountain mines (Exhibits 8,
 10, 13). At a minimum, those approval documents show BLM's support for the analysis contained

1 evidence that BLM failed to consider critical “relevant factors,” warranting supplementation of the
2 record in this case.

3 This Court should also supplement the record to consider evidence “as background
4 information on complex issues.” Bundorf, at 1147. BLM acknowledges that this Court may
5 supplement the record “to explain technical concepts to the court.” Fed. Resp. 13. That is clearly
6 the case here, as the BLM leasing EAs, and the FEIS and EA for the Gold Bar and Prospect
7 Mountain mines, each provide clarity as to the expected environmental impacts from operations
8 conducted under those agency approvals. The expected impacts to air and water resources from
9 mining projects and from operations conducted on oil and gas leases in the area of the proposed
10 Mt. Hope mine are certainly complex and require technical analysis.

11 The detailed analysis of these impacts was actually performed in the BLM EAs and EIS
12 that are the Exhibits to GBRW’s Motion, rather than the cursory review contained in the FSEIS –
13 documents that highlight the internal inconsistencies between the challenged FSEIS and all these
14 other BLM documents. For example, the oil and gas leasing EAs each analyze the complex
15 science behind expected air pollution from a representative oil and gas operation, factors
16 completely lacking in BLM’s review of the cumulative impacts from oil and gas operations in the
17 FSEIS. *See, e.g.*, Exhibit 12 (2019 Lease Sale EA), stating that due to this complexity, “The BLM
18 National Operations Center retained the Kleinfelder Team to prepare an emissions inventory
19 estimate of criteria pollutants, GHG [GreenHouse Gases], and key HAPs [Hazardous Air
20 Pollutants] for a representative oil and gas well in the western United States (Erbes 2013),
21 designed to be used by BLM staff to evaluate emissions from small oil and gas projects....
22 Defining a ‘representative’ oil and gas well for the western US was challenging as there are many
23 variables.” 2019 Lease EA at 22. None of this “challenging” analysis was considered by BLM at
24 Mt. Hope. BLM simply stated that there was no potential impacts from the oil and gas operations.
25

26
27
28 in those EAs and EISs – analysis that directly contradicts the conclusions in the Mt. Hope FSEIS
and ROD.

Overall, BLM cannot hide from its own technical analysis, contained in the oil and gas EAs from other offices and from the same BLM office, and in the EIS (for the Gold Bar mine) and EA (for the Prospect Mountain mine) also issued by this same office.

III. This Court Can Take Judicial Notice of BLM's Documents

BLM does not attempt to argue that GBRW's Exhibits, which are BLM's own documents, many produced by the very same BLM office, are not accurate or are subject to reasonable dispute. Rather, they rely on cases where parties attempted to submit non-government documents from other entities (Rybachek v. U.S. EPA, 904 F.2d 1276, 1296 n. 25 (9th Cir. 1990)) or from a state agency that did not "have any relevance to a NEPA analysis" that was at issue in Great Basin Mine Watch v. Hankins, 456 F.3d 955, 976 (9th Cir. 2006). In Great Basin, a case challenging BLM's approval of a mine, the court did not take judicial notice of a state agency document because it "did not assist in understanding either the subject matter of this case or BLM's decision." Id.

That is not the situation here, as the BLM documents go directly to the subject matter of this case and BLM's decisions. As explained above and in GBRW's Motion, these documents directly contradict BLM's assumptions regarding baseline air quality levels, and the predicted cumulative impacts to water and air from operations on the oil and gas leases and mining operations near Mt. Hope.

The Ninth Circuit has recognized the appropriateness of taking judicial notice of BLM documents that assist the court analyzing BLM actions in a specific case. "The 2005 Handbook, along with the BLM briefs in other courts that we cite later in this opinion are not in the record. We take judicial notice of these public documents. *See* Fed.R.Evid. 201(b)(2)." Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1112 n.14 (9th Cir. 2008)(judicial notice of BLM documents to determine if they show a divergence of BLM actions/policy compared to actions taken in case under review). *See also* Ursack, Inc. v. Sierra Interagency Black Bear Group, 2009 WL2422784, *6 (N.D. Cal. 2009)(taking judicial notice of documents on agency website "which provide relevant background information that may shed light on the context of [the agency's]

1 decision.”); New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 702 n. 22 (10th Cir. 2009)
 2 (taking judicial notice of data on web sites of federal agencies).

3 **IV. BLM Cannot Exclude Documents from Judicial Review Simply by Labeling Them**
 4 **“Deliberative”**

5 BLM argues that because it has labeled an unknown number of agency documents as
 6 “deliberative,” there is no way for this Court or the parties to ascertain whether these documents
 7 are truly “deliberative” and what role they played in BLM’s decision-making. The agency also
 8 refuses to provide a privilege log for the documents it asserts are covered by its claimed privilege,
 9 further hamstringing judicial review of agency action.

10 GBRW acknowledges that some courts have held that truly deliberative documents may
 11 not be part of the record. The recent decisions that have analyzed this issue in detail, though, hold
 12 that the agency cannot escape its duty to produce the “whole record” by such tactics.

13 The Ninth Circuit has noted, however, that ‘many district courts within this circuit have
 14 required a privilege log and in camera analysis of assertedly deliberative materials in APA
 15 cases.’ *In re United States*, 875 F.3d 1200, 1210 (9th Cir. [2017]). ... The Court agrees with
 16 the other judges of this district. The deliberative process privilege protects only certain
 17 types of documents and, as with all privileges, the burden of proving its applicability lies
 18 with the party seeking to avoid production. **An agency may not simply declare that it
 has withheld privileged documents without disclosing their existence, identifying the
 privilege asserted, or providing plaintiffs and the Court with enough information to
 test the assertion.**

19 Washington v. U.S. Dept. of State, 2019 WL1254876, *2 (W.D. Wash. 2019)(other citations
 20 omitted)(emphasis added).

21 The current Department of Justice position is contrary to the law in this Circuit, as the host
 22 of cases cited by Citizen Groups point out. In two cases decided since the latest
 23 Department of Justice memorandum, the Ninth Circuit did not overturn the district court's
 24 order requiring all materials directly and indirectly considered by the agency in the
 25 administrative record. *See In re Thomas E. Price*, No. 17-71121 (9th Cir. Jan. 26, 2018)
 (denying writ of mandamus after a court order requiring decisional documents and a
 privilege log); *see also In re United States*, 875 F.3d. 1200, 1208 (9th Cir. 2017), *vacated*
on other grounds by In re United States, 138 S.Ct. 443, 445 (2017).

26 Sierra Club v. Zinke, 2018 WL 3126401, *3 (N.D. Cal. 2018). “If this Court were to adopt such
 27 reasoning, an agency would be free to unilaterally determine which documents should be included
 28 in the administrative record and which should not. This process would prevent any court review of

1 the agency's decision to omit certain records, and would leave parties, such as Petitioners, with no
2 legal recourse." Wyoming v. U.S. Dept. of Interior, 2008 WL11335191 (D. Wyo. 2008).

3 This reflects the evolving line of cases within this Circuit which increasingly find that, at a
4 minimum, the agency must produce a privilege log so that this Court may determine if the asserted
5 "deliberative" documents meet the test for excluding them from the record.

6 [T]he Court is convinced that the better view is that the "whole record" includes
7 deliberative materials that were "directly or indirectly considered by agency decision-
8 makers." *Thompson*, 885 F.2d at 555. When tasked with review of an agency decision
9 under the APA, it is essential that the Court understand the agency's reasons for its
decision. This includes the agency's stated reasons but may also include draft or
deliberative documents exchanged in the course of reaching a decision.

10 Cntr. for Biol. Div. v. Bernhardt, 2020 WL1130365, *3 (D. Mont. 2020). "This is not to say that
11 deliberative documents must always be included. The agency may protect such documents by
12 asserting the qualified deliberative process privilege but must produce a privilege log to do so." *Id.*

13 "[U]nder some circumstances, predecisional deliberative communications may go to the
14 heart of the question of whether an agency action was arbitrary and capricious, an abuse of
15 discretion or otherwise inconsistent with the law[.]" Desert Survivors v. U.S. Dept. of the Interior,
16 231 F. Supp. 3d 368, 382 (N.D. Cal. 2017). "[A]n administrative record that fails to include such
17 communication amounts to a 'fictional account of the actual decisionmaking process.' *Portland*
18 *Audubon Soc.* at 154[8]." Bernhardt, 2020 WL1130365, *3.

19 GBRW does not ask that truly deliberative documents be included in the record. Yet that
20 privilege is not absolute, and a district court has ample authority to gauge the correctness of the
21 reasoning behind the excluded document, or portions thereof. For example, it is undisputed that
22 factual material is not considered deliberative. F.T.C. v. Warner Comms' Inc., 742 F.2d 1156,
23 1161 (9th Cir. 1984). But under BLM's view, this Court and Plaintiffs will never know.

24 GBRW respectfully requests that this Court reject BLM's blanket assertion that it can
25 exclude any document that it unilaterally labels "deliberative," with no judicial check whatsoever.
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1 Respectfully submitted this 23rd day of November, 2020.

2 /s/ Roger Flynn

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17 Certificate of Service

18 I, Roger Flynn, hereby certify that I submitted the foregoing to all parties, via this Court's ECF
19 filing system, this 23rd day of November, 2020.

20 /s/ Roger Flynn